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Supreme Court of The United States

October Term, 2001

STANLEY L. MALKIN,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the government's burden under Internal Revenue Code Section 6501(c)(4) to prove the existence of a consent in writing to extend the statute of limitations for assessment of a tax may be met by evidence of a computer generated transcript of account that contains no information about the authenticity or content of the alleged consent and whether such a transcript of account is admissible in evidence for such purpose.

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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 2001

STANLEY L. MALKIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Stanley L. Malkin respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. infra, 1a) is reported at 243 F.3d 120 (2001). The opinion of the District Court (App. infra, 12a) is not officially reported. It is unofficially reported at 2000 WL 37996 (S.D.N.Y.).

JURISDICTION

The judgment of the Court of Appeals was entered March 12, 2001. (App. infra, 9a.) The jurisdiction of this Court is invoked under Title 28 United States Code, section 1254(1).

AUTHORITIES INVOLVED

Internal Revenue Code (Title 26, United States Code) Section 6501(a):

> **General rule.** – Except as otherwise provided in this section, the amount of tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) * * *.

Section 6501(c)(4):

> **Extension by agreement.** – Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title, except the estate tax provided in chapter 11, both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

Federal Rules of Evidence, Rule 1002:

> **Requirement of Original**
>
> To prove the content of a writing * * * the original writing * * * is required, except as otherwise provided in these rules or by Act of Congress.

Federal Rules of Evidence, Rule 1004:

> **Admissibility of Other Evidence of Contents**
>
> The original is not required, and other evidence of the contents of a writing * * * is admissible if –
>
> (1) **Originals lost or destroyed.** All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
>
> * * *

STATEMENT

A. Why this is an Appropriate Case to Review Whether the Requirement of Internal Revenue Code Section 6501(c)(4) that a Consent to Extend the Statute of Limitations Be in Writing May Be Satisfied by Evidence that Does Not Prove the Contents of the Disputed Writing

Section 6501(c)(4) of the Internal Revenue Code requires that a consent to extend the statute of limitations for assessing additional taxes be "in writing." In cases where a disputed written consent form has been lost or destroyed in good faith, courts have admitted into evidence other "secondary evidence" to prove the existence of a valid written waiver. However, until this case, no court has permitted the government to prove the existence of a written waiver using only a computer-generated transcript of account. While such transcripts are admitted in evidence to prove lesser, ministerial facts, such as the date a payment was received or the date an assessment was made, such transcripts have never been admitted in evidence to prove the existence of a waiver; courts have uniformly rejected transcripts for this purpose. In this case, the transcript was not only admitted, but it served as the government's only evidence to contradict the taxpayer's reliable and corroborated testimony that he never signed such a waiver.

The computer printout can be based on data that is entered into the system without appropriate safeguards to assure that it is authentic or correct. No procedures exist that require that a taxpayer's alleged signature on a waiver form be verified for authenticity before the waiver is entered into the database. Moreover, the database lacks any indication regarding whether an alleged waiver contained terms, conditions, or limitations that might render it inapplicable to the tax adjustments in a given case.

No case demonstrates more vividly than this case does the inequity that could befall taxpayers when the I.R.S. claims that it lost or destroyed its file and attempts to justify using a transcript to replace an alleged consent form that the taxpayer testified never existed. The government does not hesitate to stigmatize the taxpayer as being unworthy of belief for his "self-serving" testimony that he did not sign the waiver, as happened in this case, and bases that unfair and unseemly characterization on the most questionable evidence that its own witnesses admit is unreliable.

The intent of Congress in requiring that the waiver be "in writing" evidently must have been to assure the reliability of the waiver. The transcript herein was not only unreliable, but it could just as readily have met a hypothetical less rigid statutory requirement that the waiver be verbal, as opposed to "in writing." Thus, permitting transcripts to prove the existence of written waivers completely frustrates the evident intent of the statute that the waiver have additional guarantees of reliability, i.e. that it be "in writing." If transcripts were admissible to prove written consents, there would be no need to keep the written consents, or even to require that consents be in writing. The statute, in effect, would be nullified.

If this Court does not review the Court of Appeals' endorsement of the Internal Revenue Service's use of bare computer transcripts of account to prove the existence of written consents, it will encourage the Internal Revenue Service's poor record-keeping practices, which could not possibly be more slipshod than they were in this case. Public confidence in the fairness of the revenue collecting system and, in turn, in the courts that condone such record-keeping practices will be undermined.

B. Proceedings Below

The United States Court of Appeals for the Second Circuit issued a nine-page decision in which it accepted at face value the representations made by the I.R.S. regarding the reliability of its record-keeping practices and the good faith loss or destruction of its file for petitioner. (App. 1a .)[1] The Court disregarded numerous inconsistencies and anomalies that petitioner proved at trial and argued on appeal that exposed the inadequacy of the I.R.S.'s explanations for having lost or destroyed its file.

The District Court also accepted at face value the government's explanations for having lost the original alleged waiver form. (App. 12a.) That court also disregarded the numerous serious inconsistencies in the government's explanations. The District Court found petitioner to be believable in his testimony. However, it concluded that he might not have known that the waiver form was signed by someone else in his behalf, namely his office secretary, who, according to the court, might have received the waiver form in the office mail and signed and returned it. The District Court concluded that the I.R.S. would be entitled to rely upon such a signature, as it would constitute apparent authority. (App. 16a.) However, that argument was never made at trial, and the facts to support it were never elicited. Petitioner's office secretary could not possibly have signed any waiver form in his behalf because even if one were mailed, it would have been mailed to the address on petitioner's tax returns, which was his residence address, where he does not have a secretary. (A4.)

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[1] "App." references are to the Appendix to this Petition. "A" references are to the Joint Appendix to the brief filed in the Court of Appeals. These include references to exhibits and testimony reproduced in the Joint Appendix.

C. Statement of Facts

1. Overview

Dr. Malkin filed his U.S. Individual Income Tax Return (Form 1040) for 1979 on April 9, 1980. (A189-A190; A7.) The I.R.S. claimed that Malkin signed a consent to extend the statute of limitations (Form 872) on March 16 or 22, 1983. Malkin categorically denied that he signed such a form before April 15, 1983.[2]

The I.R.S. did not possess the alleged Form 872. Malkin's testimony was corroborated by his accountant who testified that he did not recall such a form. In 1991, when the appeals officer was demanding that petitioner "come to a conclusion" regarding his 1979 taxes, the accountant contacted the appeals officer, Joan Carter, and requested that she provide him the "extensions" (A144) or the "waivers." (A146.) On April 25, 1991, Ms. Carter sent him a Special Consent, Form 872A, executed by petitioner September 14, 1983. Carter did not send the accountant a waiver or extension dated prior to April 15, 1983.[3]

The accountant testified that Ms. Carter sent him the Form 872A dated September, 1983, and "nothing else." (A147.) At trial, Ms. Carter said she had no recollection of

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[2] Malkin's denial that he signed the Form 872 was believable because it was a matter of record long before the I.R.S. first stated that its file for him for 1979 was lost or destroyed. It is not likely he would falsely deny under oath that he signed a form that the I.R.S. would be able to produce from its file.

[3] The I.R.S. did not produce the Form 872A in discovery. It claimed it was not able to locate its file. In late June, 1998, during discovery, Malkin provided the government the copy of the Form 872A that his accountant had received from Carter on April 25, 1991.

the material she sent to the accountant or of any events in this case. (A291-A292, A303, A321-A322.) However, before trial, Ms. Carter verified answers to interrogatories in which the government admitted that she did not send a Form 872 to the accountant when she sent him the Form 872A. (A38, A303, A334.) No other person in the I.R.S. recollected a consent Form 872 pertaining to petitioner. (A35-A36, Govt's Response to Interrogatories, Responses 4, 7, 8.)

In 1991, the I.R.S. assessed $40,280.00 additional taxes against petitioner for 1979, as well as $124,509.07 interest. (App. 20a; A24, A34 A51.) Several hundred thousand dollars of additional interest accrued thereafter.

Dr. Malkin paid the entire tax for 1979. On May 15 1997, Dr. Malkin filed a claim for refund for the part of the $40,280 of taxes that he had paid within the period of limitations for claiming a refund or credit. The I.R.S. Service Center in Atlanta denied the claim for refund without explanation on September 4, 1997. (A17-A19.) On December 10, 1997, Dr. Malkin filed this action in the District Court, claiming refund in the amount of the tax that he had paid within the period of limitation for claiming a refund, i.e., for $20,039.00. (A20-A21.)

On December 13, 1999, the case proceeded to trial before Hon. Whitman Knapp, without a jury. At trial, the government stated that it does not possess the waiver, Form 872, that Dr. Malkin allegedly had executed on March 16 or 22, 1983. The government claimed that its file for Dr. Malkin for 1979 was lost or destroyed in good faith. In lieu of the Form 872, the government offered in evidence, pursuant to Federal Rule of Evidence 1004(1), a computer printout, i.e. a "transcript of account."

According to the government's witness, the transcript indicates that a waiver, Form 872, was "secured" in March, 1983, and that it extended the statute of limitations until

April 15, 1984. The transcript showed no consent form waiving the statute of limitations after April 15, 1984. Nor did the government possess one. Malkin testified that he signed one, and only one, consent form, i.e. the Form 872A that he produced in discovery, which he had signed on September 14, 1983. That consent form extended the statute of limitations indefinitely, but it was not valid unless a waiver was signed before April 15, 1983.[4]

To rebut (a) Malkin's testimony that he did not sign a Form 872 Consent form in March, 1983, (b) that he did not sign any waiver for 1979 except the Form 872A Special Consent form, which he signed September 14, 1983, and (c) Malkin's accountant's testimony that he does not remember the Form 872 and that Appeals Officer Carter only sent him the Form 872A Special Consent form, which was signed by Malkin on September 14, 1983, the government relied solely on the transcript of account.

In order for the transcript to be admissible, the government had to prove that the alleged original Form 872 was lost or destroyed in good faith. To prove that, the government relied upon the testimony of Jennifer Gross. Ms. Gross testified that she is familiar with the Integrated Data Retrieval System ("I.D.R.S."), the I.R.S. computer system. (A228.) She testified that a "transcript of account" is a computer printout of the information contained in the master computer system concerning a particular individual and a particular tax year. (A229-A230.) She identified, Exhibits A, L and M, (A66-A74; App. 19a), all different versions of a transcript of account that pertains to petitioner's 1979 tax account. (A232-A233.) One entry is as follows: "560 03161983 198312 22277-075-77500-3 ASED – 04151984" (App. 20a.) This indicates that an 872

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[4] By giving the government a copy of the Form 872A, Malkin filled an evidentiary gap in the government's case.

form "was secured" and that the statute expiration date was extended until "4/15/84." (A245.) Exhibits A, L and M do not indicate a further extension of the statute expiration date after April 15, 1984. (A228-A230, A244-A245.)

2. Anomalies and Inconsistencies in the Government's Explanation that the File was Lost Or Destroyed in Good Faith

The I.R.S.'s file was not lost or destroyed in good faith. In fact, it was not lost or destroyed at all when the litigation began. It existed on May 29, 1998, nearly six months after the litigation commenced. On that date, the government stated that Dr. Malkin had signed a Form 872A that extended the period of limitations for 1979 indefinitely. (A25, Defendant's Response No. 6 to Plaintiff's First Request for Admissions, dated May 29, 1998.) However, the government's transcript of account contained no indication of the Form 872A, and petitioner did not provide that form to the government until a month later. (A490.) Appeals Officer Carter testified that she did not know how the government could posses such knowledge about a Form 872A if it did not possess the file. (A344-345.) Therefore, the claim that the file was lost or destroyed before the litigation began is dubious.

That claim also is suspect because Ms. Gross had no first-hand knowledge of the effort to locate the file. She received all her information regarding that effort from a chain of unidentified intermediaries. (A257-A258.) Ms. Gross did not personally conduct the searches. (A240, A257-A258, 262.) Plaintiff's objection to this testimony based on hearsay was overruled. (A240.)

Even if the file were lost or destroyed, it was not lost or destroyed "in good faith." Ms. Gross testified that the I.R.S. keeps a file pertaining to a taxpayer for a particular year seven years after the case is closed. The seven years

began to run in this case in 1991, so the file in this case would have become eligible to be destroyed not earlier than January, 1998, according to Ms. Gross. The seven-year document retention policy is never violated. (A259-A260.) Ms. Gross testified that this policy makes it impossible for the I.R.S. file in this case to have been destroyed prior to January 1998. (A266-A267.) However, Ms. Gross also testified that if a claim for refund had been filed or if litigation had started before January, 1998, the file could not have been destroyed even after January 1, 1998. (A265-A266, A279.)

The claim for refund was mailed to the Internal Revenue Service on May 15, 1997, and it was received by the Atlanta Service Center on May 21, 1997. (A12-A16.) Thus, the file was not yet eligible for destruction at the time the claim for refund was filed and received. In addition, the Summons and Complaint were served in person upon the United States Attorney's Office on December 10, 1997. (A1, A20, A21.) Thus, the file was not yet eligible for destruction at the time the Summons and Complaint were served in person. Based on the foregoing, the file had to exist after the refund claim was filed and after the litigation had begun. Moreover, as shown above, the file had to exist as late as May 29, 1998. Any claim that it was lost or destroyed pursuant to normal policy is most suspicious. In these circumstances, it appears that a Form 872 never existed.

3. The Inadequacy of the Information Contained in a Transcript of Account for the Purpose of Proving A Consent to Extend the Period of Limitations

According to Ms. Gross, the transcript indicates only that on the 75th day of 1983 someone in the District Office made an entry in the I.R.S. computer's Integrated Data Retrieval System (I.D.R.S.) that a Form 872 had been secured. (A248-A249.) Ms. Gross had "no notion of the district office and their procedures." (A261.) She was not

aware if the signature on a Form 872 is verified for authenticity before the existence of the form is entered in the computer. (A272.)

Ms. Gross testified that transcripts are not reliable to determine if a statute of limitations is open. She said that if she relied solely on the transcript of account, she would have to conclude that the statute of limitations for 1979 is **not** open. (A273-A274.) The transcript indicates that the statute was extended until April 15, 1984, and the transcript contains no indication of a subsequent extension. (A51-A52.)

Ms. Gross admitted that it is possible for entries in the I.D.R.S. system to be erroneous, in which case transcripts of account could contain mistakes. (A274-A275.) For example, one version of the transcript of account indicates that the taxpayer is single (A51, A275), whereas the "source" of that entry, i.e. the tax return, indicates he is married. (A4, A275.)

4. The Inadequacy of the I.R.S.'s Procedures for Securing 872's and Assuring their Authenticity

Robert Marino is employed by the I.R.S. as a supervisor in a large corporate income tax returns group. He has worked for the I.R.S. 27 years beginning as a revenue agent auditing personal, partnership and corporate income tax returns. He also served as a group manager in the quality review staff. (A386-A388.)

Revenue Agent Marino was the first revenue agent assigned to Dr. Malkin's 1979 income tax return, but he was no longer assigned in March, 1983, when a consent supposedly was secured, and he has no knowledge of an alleged Form 872. Revenue Agent Stanko was assigned subsequently. No effort was made to produce Stanko as a witness. (A39, A319, A435-A436, A439, A442, A524.)

Mr. Marino testified that a revenue agent who allows the statute of limitations to expire could be suspended without pay. (A448.) When a revenue agent gives a Form 872 allegedly signed by a taxpayer to a group manager for the group manager's signature, there is no published policy that requires the group manager to compare the taxpayer's signature on the Form 872 with the signature on his tax return in order to verify the authenticity of the signature. (A450.) Both the revenue agent and the group manager have an "incentive" to make sure that a statute of limitations has not expired. (A454.)

All the I.R.S. procedures Marino identified regarding statutes of limitations (A77-A114) pertain to steps to be taken by revenue agents and their supervisors to make sure that the statute of limitations does not expire. There are no procedures that pertain to measures to assure that a signature on a Form 872 is authentic. (A452-A453.) Moreover, during a period that included March, 1983, the Newark District was so flooded with cases that it "was forced" to rely on clerks, instead of revenue agents, to solicit Forms 872. (A481-A482, A 485.)

Sometimes, a Form 872 may be obtained from a taxpayer that limits the extension of the limitations period to a particular issue or issues on a tax return. (A466.) It is not known from the transcript of account if the alleged Form 872 in this case was restricted to a particular issue or issues. (A51.) There is no transaction code to indicate that a Form 872 is restricted to a particular issue or issues. (A468.) Like Ms. Gross (A273-A274), Mr. Marino testified that he "wouldn't rely on a transcript to ensure that an 872 was -- that the statute was still open." (A468.)

REASONS WHY THE WRIT SHOULD ISSUE

I

THE WRIT SHOULD ISSUE SO THIS COURT CAN DETERMINE WHETHER THE COURT OF APPEALS' NOVEL INTERPRETATION OF SECTION 6501(c)(4) IS CONSISTENT WITH THE INTENT OF CONGRESS THAT CONSENTS TO EXTEND THE STATUTE OF LIMITATIONS BE IN WRITING

Section 6501(c)(4) of the Internal Revenue Code requires that consents to extend the statute of limitations for assessment be made "in writing." Rule 1002 of the Federal Rules of Evidence requires that the original writing be offered in evidence. Rule 1004(1) of the Federal Rules of Evidence permits "other evidence" if the original writing has been lost or destroyed in good faith. However, a transcript of account is not a duplicate. It is a computer printout of entries made in the computer database. On its face, it does not contain the information required by Section 6501(c)(4), and, therefore, does not constitute "other evidence" of the contents of the writing.

A transcript of account does not prove the "contents of a writing," per Rule 1004. It does not prove that a written consent was made, that it was authentic, or the terms and conditions that the written consent contained. Transcripts of account are not sufficiently reliable. They are not designed or intended to prove the existence, authenticity or terms of a waiver. Until this case, no Court of Appeals or District Court has accepted a transcript of account to prove the existence, authenticity or terms of a waiver. Nor has the United States Tax Court.

A. COMPUTER GENERATED TRANSCRIPTS ARE NOT SUFFICIENTLY RELIABLE TO MEET THE REQUIREMENT OF SECTION 6501(c)(4) THAT A CONSENT TO EXTEND THE STATUTE BE IN WRITING

Errors in the transcript in this case and the design and purpose of transcripts in general make it unreasonable for a court to rely upon a bare transcript to prove that a taxpayer executed a valid and timely written waiver of the statute of limitations or to prove the terms of that waiver. To give credit to such an unreliable transcript would be contrary to the intent of Internal Revenue Code Section 6501(c)(4), which requires that the consent be "in writing." The intent of that statute must have been to assure that the writing be preserved in the event of a dispute. A transcript does not contain the information needed to prove the authenticity, terms, or accuracy of an alleged waiver. The transcript in this case contains errors, including the omission of any indication of the existence of the Form 872A.[5]

The "in writing" provision is intended to assure minimal standards of reliability to prove that a waiver exists and is authentic. A computer entry such as the one in this case, provides as much assurance of a verbally communicated waiver as it provides that a written waiver once existed. Therefore, such a transcript certainly could not fulfill the intent of Congress that the consent be in writing or that it be reliable.

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[5] In its brief in the Court of Appeals, the government stated, without support in the record, that this was not an omission because the I.R.S. was aware of the Form 872A based on a **third** database. That statement raised troubling questions about the thoroughness of the government's discovery answers and about the qualifications of its witnesses to testify regarding I.R.S. record-keeping practices. Ms. Gross testified that there are only two databases (IDRS and AMDIS) and neither one disclosed the 872A or led to the location of the file.

Moreover, the circumstances of the alleged good faith loss or destruction of the original writing are so suspicious in this case that its existence must be questioned. By allowing transcripts as replacements for original consent forms, the Court of Appeals, in effect, encourages careless I.R.S. record-keeping, questionable testimony, and unseemly attacks on the credibility of honest taxpayers. Accepting a mere transcript instead of the required written consent will effectively eliminate the "in writing" provision of the statute and enable the government to rely upon uninformative and unreliable documents in place of the best evidence. It will permit the government to pontificate about the reliability of its policies, even in a case, such as the present one, where those policies are shown to have been flouted. It will also enable the government to brand as unworthy of belief honest taxpayers, such as this petitioner who provided the government the Form 872A that was essential to its case.

The government's reliance on a transcript that its own witnesses described as unreliable (A273-A274, A468), its justification of the use of the transcript through dubious testimony about its record-keeping practices, and its baseless attacks upon the honesty of a taxpayer who denies that he has signed a waiver or consent form create an unseemly spectacle. If the government wants to prove a consent, it ought to produce the written consent required by statute or, at a minimum, secondary evidence far more reliable than a transcript. (See *infra* at 20-21.)

To assure reliable record-keeping by the I.R.S., to promote public confidence, and to deter unseemly and unjustified stigmatization of honest taxpayers, this Court should grant the petition in order to determine whether transcripts of account may be admitted in evidence to prove the existence, authenticity and content of waiver forms.

B. UNTIL THIS CASE, NO COURT OF APPEALS OR DISTRICT COURT HAS ADMITTED A TRANSCRIPT OF ACCOUNT TO PROVE THE EXISTENCE, AUTHENTICITY OR CONTENT OF A WAIVER

Transcripts of account have been admitted in evidence by courts to prove an event other than the content of a writing, such as that payments have been made or that tax returns were filed on particular dates. However, until this case, courts have rejected transcripts of account when they are offered to prove the content of a writing.

In *United States* v. *Jones*, 958 F.2d 520 (2d Cir. 1992), the court approved the admissibility of a transcript of account to prove that a defendant made payments on her tax liability. The transcript recorded those events. Defendant's argument in *Jones* was that the transcript should not have been admitted to prove the contents of the tax return, but that only the tax return is admissible for this purpose. The court agreed that an original writing is required to prove the content of the writing, but held that the transcript could be admitted because the content of the original writing (a tax return) was not in issue, but that only the payment was in issue. 958 F.2d at 521. The Court of Appeals' decision in this case contradicted its own dictum in *Jones*.

In *United States* v. *Forma*, 72 AFTR2d 93-6481, 93-1 USTC para. 50,076, 1993 WL 15007 (S.D.N.Y. 1993), the District Court received in evidence a Certificate of Assessments and Payments to prove that an assessment was properly made, relying on the rationale that assessments are internal, governmental actions that are entitled to a presumption of correctness. However, the District Court in *Forma* rejected the Certificate of Assessments and Payments as evidence that a waiver was properly executed. The District Court refused to consider the transcript as evidence

that a statutory right was waived in the manner required by statute (I.R.C. Section 6213(d)). 1993 WL at *5

Similarly, in *Godfrey* v. *United States*, 997 F.2d 335 (7th Cir. 1993), the transcript entry "6/4/90 REFUND OF OVERPAYMENT $279,323" was not admitted to prove that a check was properly mailed to the taxpayer to prevent the accrual of interest on a refund pursuant to I.R.C. Section 6611. The court stated, "When it contains an appropriate entry, we have held that this document constitutes evidence that an assessment was made in accordance with the law. * * * However, because these cases involve a different IRS document, the exact content of which the government has failed to present to this court, these decisions * * * do not affect our conclusion that the Godfreys' computer transcript alone does not establish the mailing of the original refund check." 997 F.2d at 339 and note 5.

Furthermore, in *United States* v. *Berman*, 58 AFTR2d 86-5255, 86-1 USTC para. 9439; 1986 WL 9239 at *2 (S.D. Ohio 1986), the court held that a computer transcript does not satisfy the government's proof by a preponderance of the evidence that notice of assessment was sent to the taxpayer. 1986 WL at *5.

The decisions of the Courts of Appeals, including those of the Second Circuit, and the District Courts uniformly reject computer data as evidence of the content of waivers and hold that computer transcripts ought not to be admissible to prove the existence, authenticity or content of writings, particularly of writings that purport to waive statutory rights and that are required by statute to prove such waiver. Only the decisions below in this case depart from that uniform rule.

C. EVEN IF A TRANSCRIPT OF ACCOUNT WERE ADMISSIBLE TO PROVE THE CONTENT OF A WRITING, IT IS PER SE INSUFFICIENT TO MEET THE GOVERNMENT'S BURDEN TO PROVE THE EXISTENCE, AUTHENTICITY AND CONTENTS OF A WAIVER

The burden to prove the existence of a written consent is with the government. "When the Commissioner relies on such an exception to the general rule (Internal Revenue Code, Section 6501(a)), he bears the burden of pleading and proving that the exception is applicable." *Peters* v. *Commissioner*, T.C. Memo 1978-219, 1978 WL 2910 (U.S. Tax Ct.), 37 T.C.M. (CCH) 941, T.C.M. (P-H) para. 78,219 (United States Tax Court 1978); *Bonwit Teller & Co.*, v. *Commissioner*, 10 B.T.A. 1300 (1928); *Farmers Feed Co.* v. *Commissioner*, 10 B.T.A. 1069 (1928); see also, *Cross* v. *United States*, 1995 WL 835380, 96-1 U.S.T.C. (CCH) para. 50,125, 77 A.F.T.R.2d 96-788 (D. Kansas 1995)(holding that the government bears the burden to prove the existence of an allegedly lost Form 870-AD and the government bears the burden of proving that the waiver was validly executed) (citing *United States* v. *Conry*, 631 F.2d 599, 81-2 U.S.T.C. (CCH) para. 9618 (9th Cir. 1980)). A transcript of account has never been sufficient to meet this burden. All reported cases involving secondary evidence to prove an alleged missing consent involve a far greater quantum and quality of evidence in behalf of the government and no denial by the taxpayer that he signed a consent.

In every case in which a court has held that the I.R.S. met its burden (and even in one case where a court held that the I.R.S. did not meet it), either the I.R.S. was able to produce evidence from which strong inferences could be drawn in its favor, including the personal recollection of I.R.S. employees, or the taxpayer did not deny that he signed a consent form. In this case, petitioner denied unequivocally

that he signed a consent form prior to April 15, 1983, **and** the I.R.S. failed to present evidence to the contrary other than its transcript of account.

In *Peters* v. *Commissioner*, T.C. Memo 1978-219, 1978 WL 2910 (U.S. Tax Ct.), 37 T.C.M. (CCH) 941, T.C.M. (P-H) para. 78,219 (United States Tax Court 1978), the I.R.S. lost the Form 872 that extended the limitations period to June 30, 1977. However, it did possess the rest of its file, including secondary evidence to prove that consents were properly executed. The I.R.S. presented the testimony of its suspense clerk and her reviewer, both of whom recalled receiving the Form 872 executed by the taxpayers' representative. The clerk also identified the control card on which she made an entry that showed the extended statute date. She testified that she is confident that she would not have made the entry unless she examined the forms "to assure herself that they have been properly executed." [6]

Moreover, unlike the government's witnesses in the present case, who remember nothing, the clerk in *Peters* accounted for the reasons why the forms were missing from the file. She testified that she mistakenly sent both duplicate originals back to the taxpayers' representative. The clerk's supervisor confirmed that explanation, and it also was memorialized in writing and attached to the reviewer's memorandum that the government still possessed. T.C.M. 78, 219 at 78-935 to 78-936.

The Tax Court held in *Peters* that the Commissioner bears the burden of proving that the Section 6501(c)(4) exception is applicable. The Court analyzed the

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[6] In the present case, the I.R.S. claimed that it lost or destroyed its entire file. Therefore, none of the foregoing reliable secondary evidence exists in this case.

overwhelming secondary evidence offered by the government, and it observed that the taxpayers did not testify or deny that they had signed waivers. The Tax Court held that the evidence was "in relative balance or equipoise," that the Commissioner failed to carry his burden, and that the statute of limitations had expired. Id. at 78-937.

In contrast, the Commissioner in this case presented (a) no witnesses who have personal recollection that a Form 872 was properly executed, (b) no contemporaneous written memorandums, and (c) no control cards. Moreover, (d) the taxpayer testified unequivocally in this case that he did not execute a consent form in March, 1983, unlike in *Peters*, and (e) his accountant testified that the I.R.S. did not send him the disputed Form 872 when it sent him the Form 872A.

Similarly, in *Cross* v. *United States*, 1995 WL 835380, 96-1 U.S.T.C. (CCH) para. 50,125,77 A.F.T.R.2d 96-788 (D. Kansas 1995), where a waiver of a different kind (Form 870AD, permitting entry of an assessment without the statutory prerequisite of a notice of deficiency) was lost, the Court considered abundant secondary evidence offered by the government. The District Court in *Cross* held that the I.R.S. met its burden through the foregoing secondary evidence. The Court held, "The fact that plaintiffs do not remember signing the form in question is not sufficient to rebut the evidence . . .." 77 A.F.T.R.2d para. 96-788, at 8. In contrast, in the present case, Malkin does remember that he signed one form, and only one form, which was the untimely Form 872A. His accountant corroborated that testimony. See also *United States* v. *McGaughey*, 977 F.2d 1067, 1071 (7th Cir. 1992); *United States* v. *Conry*, 631 F.2d 599, 81-2 U.S.T.C. (CCH) para. 9618 (9th Cir. 1980).

The government cannot prove from a computer entry how the form was executed. Such proof did exist in *Peters* and *Cross* because persons who recollected the events and

their written entries on other forms testified in behalf of the I.R.S. In this case, the government did not possess any such person who has any personal recollection.

Accordingly, in view of the Second Circuit's decision, which is in conflict with the decisions of other Courts of Appeals, and in view of the Second Circuit's sanction of a lower court's extreme departure from the accepted and usual course of judicial proceedings, this Court ought to grant the petition to review the decision of the United States Court of Appeals for the Second Circuit. By granting the petition, this Court can determine the minimum quantum of evidence needed to meet the government's burden in a missing waiver case and whether a transcript of account is admissible for that purpose or sufficient, on its own, to meet that burden.

CONCLUSION

The Petition for a writ of certiorari is meritorious and should be granted.

Respectfully submitted,

Jared J. Scharf
1025 Westchester Avenue, Suite 305
White Plains, New York 10604
(914) 682-9777
Counsel of Record for Petitioner
Stanley L. Malkin

June 6, 2001

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2000
(Argued: October 11, 2000 Decided: March 12, 2001)
Docket No. 00-6063

STANLEY L. MALKIN,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Before: NEWMAN and KEARSE, Circuit Judges, and KORMAN, Chief District Judge*

Appeal from a judgment of the United States District Court for the Southern District of New York, Whitman Knapp, Judge, dismissing complaint seeking a refund of income taxes,

Affirmed.

JARED J. SCHARF, White Plains, New York, for Plaintiff-Appellant.

KAREN B. KONIGSBERG, Assistant United States Attorney, New York, New York (Mary Jo White, United States Attorney for the Southern District of New York, Jeffrey S. Oestericher, Assistant United States Attorney, New York, New York, on the brief) for Defendant-Appellee.

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* Honorable Edward R. Korman, Chief Judge of the United States District Court for the Eastern District of New York, sitting by designation.

KEARSE, Circuit judge:

Plaintiff Stanley L. Malkin appeals from a judgment entered in the United States District Court for the Southern District of New York following a bench trial before Whitman Knapp, Judge, dismissing his complaint seeking a refund of income taxes for the year 1979 on the ground that the statute of limitations had run prior to the assessment by the Internal Revenue Service ("IRS") of a deficiency. On appeal, Malkin contends principally that the district court should have excluded from evidence documents offered by the government to show that he had timely consented to an extension of the limitations period, and that, in any event, the evidence was insufficient to show such consent. For the reasons that follow, we disagree and affirm the judgment.

I. BACKGROUND

The present controversy arises out of a tax loss claimed by Malkin on his federal income tax return for the year 1979 ("1979 return"), with respect to a certain investment. The IRS disallowed the loss based on its determination that the investment entity had generated fraudulent losses for its investors. In 1991, the IRS made an assessment against Malkin of taxes due for the 1979 tax year in the amount of $40,280. A settlement was negotiated, and Malkin paid that assessment. He commenced the present action principally seeking a refund of $20,040 of that amount, contending that the 1991 assessment was barred by the statute of limitations, which would have expired three years from the April 15, 1980 date on which Malkin filed his 1979 return, i.e., on April 15, 1983.

The government contended that the assessment was timely because in March 1983, Malkin signed an IRS consent form, Form 872, in which he agreed to a one-year extension of the limitations period, and in September 1983 signed an IRS Form 872A, in which he consented to an indefinite

extension. Malkin admitted having signed Form 872A in September 1983, but he testified that he recalled not having signed a Form 872 in March 1983. He thus contended that the statute of limitations had already run when he executed Form 872A in September 1983, and hence his execution of the latter form was ineffective to extend the limitations period.

It is undisputed that by the time of trial the IRS had lost or destroyed Malkin's entire file with respect to the year 1979; hence, it could not produce the Form 872 that it asserted Malkin had executed in March 1983. Accordingly, the government sought to show his consent through the introduction of secondary evidence. That evidence included (a) entries in two computer-generated transcripts of IRS records, admitted over Malkin's objection, indicating that the IRS had received a signed Form 872 from Malkin on March 16, 1983, and (b) testimony from three IRS employees as to standard procedures followed by IRS employees in order to verify that limitations periods have not expired.

IRS customer service supervisor Jennifer Gross testified that for each tax year for each taxpayer, the IRS maintains a separate account in an "integrated data retrieval system," or "IDRS." Any transaction relating to that account is routinely entered into the IDRS. The system uses numeric codes for the various types of transactions; the transaction code number used to indicate that an executed Form 872 has been received from the taxpayer is "560." The IRS can print two types of transcripts of the entries in a given account. One, characterized as a "literal", transcript, contains both transaction codes and a verbal description of each transaction; the other is a nonverbal transcript that contains the transaction codes, as well as additional numeric codes, but omits descriptions.

The IDRS literal transcript for Malkin's 1979 tax year showed several dozen entries; the fourth entry was a code 560, on "03-16-1983," with the description "ASSESSMENT

STATUTE EXPIRATION DATE EXTENDED TO 04-15-1984." (Government Exhibit A.) Similarly, the nonverbal transcript for Malkin's 1979 tax year showed a code 560 entry, followed by the number "03161983" (Government Exhibit M), with additional codes including "075" (id.), which Gross explained indicated that Malkin's Form 872 had been received on the 75th day of 1983, which was March 16.

In addition, Robert A. Marino, a supervisory case manager in the IRS Newark district office, in which Malkin's 1979 return was examined, described the IRS's practices for securing and recording Forms 872 and 872A and the IRS's reliance on the computerized files. Marino also testified, inter alia, that in his nearly 27 years as an IRS employee in the Newark district, he had never heard of any case in which a transcript mistakenly reflected that a Form 872 had been received when in fact one had not, nor any case in which an IRS employee had backdated a consent form. Both Marino and Gross testified that the IRS computers have an automatic dating feature for documents whose receipt is recorded in the IDRS. Thus, it would be impossible for an employee to enter an untimely Form 872 into the computer system and to backdate the entry as if the form had been received earlier.

IRS employee Joan Carter testified that in 1988-1991 she was the appeals officer assigned to handle Malkin's case. Although Carter had no recollection of his case in particular, she testified that, in all cases, ensuring that the statute of limitations had not expired was of paramount importance. Thus, upon receiving Malkin's file she would have reviewed it in its entirety to be sure that he had executed waivers for the entire period through the date of her review. Had she not found such waivers, she would have reported that fact to her immediate superior and would not have negotiated a settlement.

Following the trial, the district court, in an opinion published at 2000 WL 37996 (S.D.N.Y. Jan. 14, 2000), found that Malkin had timely consented to extensions of the

limitations period and that the IRS's assessment thus was not barred by the statute of limitations. Finding it "highly improbable" that the IRS transcripts were erroneous, 2000 WL 37996, at *2, the court found that the government had satisfied its burden of showing that Malkin furnished an executed Form 872 in March 1983, extending the limitations period, and it found that Malkin's testimony was insufficient to persuade the court to the contrary. The court stated, inter alia, that although it had no doubt that Malkin believed he was testifying truthfully when he said he affirmatively recalled that he had not signed a Form 872 in March 1983, the court found it impossible to conclude that the recollection, 16 years later, that he had not signed a particular form among the many that the IRS had sent him during the pertinent time period, was accurate:

> As one court has aptly noted, "The signing of [or failure to sign] one particular tax form among many is certainly a forgettable experience." Cross [v. United States, No. 96-3243, 1998 WL 255054, at *8 (10th Cir. May 19, 1998)]. In the case at bar, this truism is strengthened by various minor but significant inconsistencies between Malkin's testimony before us and his earlier less precise recollections.

2000 WL 37996, at *1. Accordingly, the court dismissed Malkin's claim for a refund.

II. DISCUSSION

On appeal, Malkin contends principally that the transcripts on which the government relied should have been excluded from evidence and that, in any event, the evidence was insufficient to show that he had executed a Form 872 in March 1983. We reject both contentions. Obviously the best

evidence of Malkin's execution of a Form 872 in March 1983 would have been the Form 872 itself. It was undisputed, however, that the IRS had lost or destroyed Malkin's entire file for the tax Year 1979. There being no evidence that the unavailability of that file was anything other than inadvertent, it was well within the discretion of the trial court to allow the government to introduce reliable secondary evidence as to Malkin's delivery of that form. See Fed. R. Evid. 1004(l).

Under the Federal Rules of Evidence, the hearsay rule, with certain exceptions not, relevant here, does not forbid the introduction of "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth .... matters observed pursuant to duty imposed by law as to which matters there was a duty to report." Fed. R. Evid. 803(8). IRS supervisory personnel testified that attention to the statute of limitations was of paramount importance to the IRS and was a matter of repeated review. Plainly it was the duty of IRS employees to receive Form 872 statute-of-limitations waivers from any given taxpayer and to record them in the IRS data files for that taxpayer's pertinent year.

Although Malkin argued that the IRS records should be deemed unreliable, hypothesizing that an IRS agent who had failed to get him to sign Form 872 would have had a motive to forge his signature and make a false entry into the database, he presented no evidence that any such improper conduct had occurred. Further, according to the testimony of the government's witnesses the automatic dating feature of the IRS Computer system prevents the backdating of entries. The trial court plainly was entitled to credit the IRS employees, descriptions of the agency's operations; and we see no abuse of discretion, see generally United States v. Lavin, 480 F.2d 657, 662 (2d Cir. 1973), in the court's ruling that the transcripts were sufficiently reliable to be received in evidence despite Malkin's speculations.

We also reject Malkin's contention that the evidence was insufficient to support a finding that he signed a Form 872 in March 1983. The district court's findings of fact following a bench trial "shall not be set aside unless clearly erroneous." Fed. R. Civ. P. 52(a). The fact that there was evidence to support an inference contrary to that drawn by the trier of fact does not mean that the findings were clearly erroneous. See Healey v. Chelsea Resources, Ltd., 947 F. 2d 611, 618 (2d Cir. 1991). It is within the province of the trier of fact to decide whose testimony should be credited, and we are not allowed to second-guess those credibility assessments. See, e.g., Anderson v. Bessemer City, 470 U.S. 564, 573-74 (1985). Further, "[w]here there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." Id. at 574; see United States v. Yellow Cab Co., 338 U.S. 338, 342 (1949).

Here, the IDRS literal transcript of Malkin's account for his 1979 tax year contained the code "560," representing receipt from him of an executed Form 872, and the description "ASSESSMENT STATUTE EXPIRATION DATE EXTENDED TO 4-15-1984," along with the date "03-16-1983" (Government Exhibit A). The nonverbal transcript for Malkin for 1979 likewise contained the code "560," showed the date "03161983" and indicated IRS receipt on day "075" of the year (Government Exhibit M). In addition, Carter testified that she would have reviewed Malkin's file to be sure there was no statute-of-limitations problem and if the necessary waivers had not been on file she would not have negotiated the settlement. In light of this evidence, we see no clear error in the trial court's finding that on March 16, 1983, i.e., prior to the expiration of the original statute-of-limitations period, the IRS received a Form 872 executed by Malkin, extending that period by one year. As Malkin conceded having consented, during that one year period, to an indefinite extension of the limitations period, the IRS's eventual assessment was not time-barred.

CONCLUSION

We have considered all of Malkin's arguments on this appeal and have found them to be without merit. The judgment of the district court is affirmed.

MANDATE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, Foley Square, on the 12th day of March, two thousand and one.

Before: Hon. Jon O. Newman,
Hon. Amalya L. Kearse,
Circuit Judges
Hon. Edward R. Korman*,
Chief District Judge

Docket No. 00-6083

STANLEY L. MALKIN,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ORDERED, ADJUDGED and DECREED that the judgment of said district court be and it hereby is AFFIRMED in

accordance with the opinion of this Court,

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
by
Arthur Heller
Administrative Attorney

A True Copy
Roseann B. Mackechnie,
by s/Arthur Heller
Deputy Clerk

Honorable Edward R. Korman, Chief Judge of the United States District Court for the Eastern District of New York, sitting by designation.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STANLEY L. MALKIN,

Plaintiff,

97 CIVIL 9125(WK)

-against-

JUDGMENT

UNITED STATES OF AMERICA,

Defendant.

Whereas the above-captioned case having come before the Honorable Whitman Knapp, United States District Judge, and the Court on January 13, 2000 having rendered its Memorandum & Order dismissing the complaint with prejudice, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Memorandum & Order dated January 13, 2000, the complaint is dismissed with prejudice; accordingly, judgment is entered in favor of the defendant.

Dated: New York, New York
January 20, 2000

JAMES M. PARKISON
Clerk of Court

BY:
s/
Deputy Clerk

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON 1/24/00

United States District Court, S.D. New York.

Stanley L. MALKIN, Plaintiff,
v.
UNITED STATES of America, Defendant.
No. 97 CIV. 9125 WK.
Jan. 14, 2000.

Jared J. Scharf, White Plains, for Plaintiff

Karen Konigsberg, United States Attorney's Office, New York, for Defendant,

MEMORANDUM & ORDER

KNAPP, Senior District J.

*1 This memorandum will serve as findings of fact and conclusions of law after our bench trial of this case.

BACKGROUND

Plaintiff claims that he is entitled to a refund of income taxes because the statute of limitations has run for the 1979 tax year. Defendant Internal Revenue Service (the "IRS") argues that plaintiff agreed to extend the limitations period. We find in favor of the defendant.

Plaintiff concedes that on September 14, 1983, he signed a Form 872-A, which indefinitely extended the limitations period. He contends, however, that this extension was a nullity because, contrary to the IRS's assertions, he had not previously signed a Form 872, without which the statute would have run before the Form 872-A was presented to him.

The Government, admitting that it has lost plaintiff's

entire 1979 file and therefore cannot produce the allegedly signed form, relies upon secondary evidence to meet its burden of proving the form's existence. *See, e.g., United States v. Conry* (9th Cir.1980) 631 F.2d 599, 600; *Cross v. United States* (D.Kan. Nov. 30, 1995) 1995 WL 835380, *5, *aff'd,* 149 F.3d 1190 (table), 1998 WL 255054 (10th Cir. May 19, 1998). Such evidence includes a computer transcript entry noting that the IRS received the relevant form, and numerous standard procedures through which IRS employees would have checked to verify that the limitations period had not run.

DISCUSSION

1. Plaintiff's Case

Plaintiff, Dr. Stanley Malkin, unequivocally testified that he remembers that he had not signed the pertinent Form 872 when Forms 872-A were presented to him. Although we have no doubt that he believed his testimony to be truthful at the time he gave it, we find it impossible that after sixteen years he could have had an affirmative recollection that he had not signed one of numerous forms sent to him by the IRS during that time period. As one court has aptly noted, "The signing of [or failure to sign] one particular tax form among many is certainly a forgettable experience . "*Cross,* 1998 WL 255054, at *8. In the case at bar, this truism is strengthened by various minor but significant inconsistencies between Malkin's testimony before us and his earlier less precise recollections. *Cf., e.g.,* Tr. at 105 *with* Tr. at 78-80. [FN1]

> FN1. In his 1996 letter to the IRS, Malkin states that he remembers signing a Form 872-A for 1979 but that he is uncertain whether he signed such a form for 1980. At his

deposition in 1998, Malkin repeated, "Well, I know that I executed an 872-A at the time I signed this. I didn't know if it was '79 or '80 or if it was just '79. " Tr. at 105. Yet, on direct examination at trial, Malkin seemed sure that he received both 1979 and 1980 forms, In particular, he testified that he received consent forms in the mail in September 1983 (two copies of a Form 872-A for 1979 and two copies of a Form 872-A for 1980):

Q: How many sheets of paper did you receive all together in that mailing? Do you recall?
A: I don't recall specifically, but I would say, in all likelihood, eight.
Q: Could you account for the eight? A: Yes. Two pages times two for 1979 and two pages time two for 1980.
Q: Did you read those forms.
A: Yes, I looked at them.
THE COURT: You looked at them.
Q: Did you read them?
A: I read them.
Tr. at 78.

Nicholas Paleologos, plaintiff's accountant, testified on behalf of his client. By 1983, Paleologos had for about fourteen years served as accountant and tax advisor to various clients, filing tax returns and attending audits. He said that he was generally aware of the three-year statute of limitations, but asserted that he had never challenged the IRS on statute of limitations grounds. On the contrary, he routinely advised his clients to sign any requested consent forms extending the limitations period. He invariably acted on the belief--which we find quite reasonable--that should the IRS, by a taxpayer's refusal to sign a consent form, be

denied sufficient time to make a considered judgment it would simply issue a Notice of Deficiency, thereby throwing the whole matter into Tax Court. Given such a practice, Paleologos could not--and did not pretend to--have any present recollection of having discussed with his client any particular request for an extension.

*2 His testimony, therefore, added nothing to that of Malkin on the issue before us. On the contrary, it establishes that had Paleologos become aware that the IRS had presented a Form 872 for signature--either because the IRS had mailed the form to him or because Malkin had told him of it--he would routinely have advised Malkin to sign and return it.

In summary, we find that plaintiff has offered insufficient evidence to establish that he did not sign the relevant Form 872. [FN2]

FN2. This conclusion renders moot the question of whether or not Paleologos received a copy of the signed Form 872 among the seven pages claimed to have been faxed to him in 1991. We simply note that we credit his testimony that he did not receive that form. We take Judicial notice from the experience of our own chambers that it sometimes happens that the receiver of a faxed message does not get all of the pages listed on the cover sheet, even though the sender's fax machine has "confirmed" a successful transmission.

II. The Government's Case

An entry in the IRS's computer database indicates that Malkin signed and returned a valid Form 872. Standard procedures mandate that, upon receipt of a signed Form 872

from a taxpayer, an IRS employee would have co-signed the form. Soon thereafter, other IRS personnel would verify that the form has been duly executed and only then enter an appropriate notation into the computer database. The computer automatically records the dates of such entries. Here, Malkin's transcript shows an entry for a Form 872 on March 16, 1983, a logical time for him to have returned the requested form to the IRS. [FN3]

> FN3. The Government has properly introduced the transcript into evidence. We find that the IRS conducted a diligent search for the original document--looking in every place where the document reasonably could have been found--and could not locate it. Fed.R.Evid. 1004(1).

We have considered, and rejected as highly improbable, any possible way in which an error could have been introduced into this transcript entry. First, conceivably, Malkin's secretary, who usually opens his office mail, might have signed his name to the consent form and returned it, believing such action to be a necessary formality. If such an event had occurred as a result of the manner in which Malkin had organized his affairs, we would find that his secretary had implied authority to act as she had done. Moreover, since the IRS would have acted on her signature of Malkin's name to its detriment, we would find that he had been estopped from repudiating her agency.

Second, we find no merit in plaintiff's speculation that some IRS employee might have destroyed the entire 1979 file and then forged the computer transcript. Neither plaintiff nor our own ingenuity has suggested the identity of any individual with the motive or capacity so to do.

Third, while there is of course the possibility that an IRS employee inadvertently typed in an incorrect transcript entry in March 1983, we find that plaintiff has not sufficiently rebutted the legal presumption that the transcript is accurate. Such a rebuttable presumption arises when the IRS has established administrative procedures that its employees must follow in the course of their official duties. Having found that the IRS has established such procedures and that plaintiff has offered no evidence to the contrary, we conclude that IRS employees actually did obey such procedures. *See, e.g., Cross,* 1998 WL 255054, at *8; *United States* v. *Dixon* (M.D.Ala.1987) 672 F.Supp. 503, 506, *aff'd,* 849 F.2d 1478 (11th Cir. 1988).

We also note that since the procedures outlined by the Government mandated the entry into a computer record of various taxpayer transactions, we presume that IRS employees entered such data as required, and hence that a computer-generated transcript of such taxpayer record, certified as authentic by the agency, is in fact accurate. *United States v. Forma (S.D.N.Y.* Jan. 12, 1993) 1993 WL 15007, *3-4, *vacated on other grounds,* 42 F.3d 759 (2d Cir.1994); *Flank v. Sellers* (S.D.N.Y.1987) 661 F.Supp. 952. 954.

*3 Plaintiff has failed to rebut this presumption of accuracy. Considering all of the evidence, we find it highly improbable that the entry showing receipt of the consent form is incorrect.

Although, having so found, we need not consider the Government's remaining evidence in order to make our decision, we must say that such evidence seems compelling. If plaintiff had not signed the Form 872, it seems very unlikely that the omission would have gone unnoticed in the multiple "layers of bureaucracy" constructed to ensure that

the statute of limitations does not slip by. The Government enumerated twelve independent instances where standard procedure would have required various employees to check Plaintiff's file for consent forms. [FN4] About seven different individuals, including Revenue Officer Joan Carter, would normally have monitored the file. The plaintiff has not suggested any believable reason why any of these employees would have risked being sanctioned by not reporting the absence of a crucial document from the file. [FN5]

> FN4. In summation, the Government lists eleven administrative practices. We, however, note an additional level, namely the yearly, "inventory, validation listing," during which agents would examine and verify the actual tax return. Tr. at 286.

> FN5. During trial, we several times indicated our belief that it was unreasonable for the IRS--in light of its own mismanagement and delays--to assess interest of approximately $300,000 because Dr. Malkin failed timely to remit the approximately $40,000 ultimately found to be due. Tr. at 241- 51, 379-80. While we adhere to that belief, we conclude that the question is not properly before us.

CONCLUSION

For the foregoing reasons, plaintiff's complaint is DISMISSED with prejudice and the Clerk is directed to enter judgment in favor of the Government.

SO ORDERED.

END OF DOCUMENT

No-0001 IMF MCC TRANSCRIPT - SPECIFIC
Emp no 19-850-07869
ACCOUNT No. 208-32-4771 12-09-1999
NAME CONT-MALK CYCLE-199949
****
For 1985007869 by- 1985007869 on 12091999 Typ-S-30-197912
Time -09:52 SRC-1 PROCESSED on-343
REQUESTED TAX MODULE
FOUND ON MF

1993 1 STANLEY L. MALKIN
4900 N. OCEAN BLVD
199821 FT. LAUDERDALE FL 33308-2912-991

PRIOR NAME CONTROL - FZ>
LOC-6501 MFR-05 VAL -1 IRA- CAF-1

YEAR REMOVED-ENT EXT CYC-199946 FYM-12 SCS- CRINV- 130-
RPTR- PMF- SHELT- BNKRPT- BLLC-
ACCRETION- MIN SE-
JUSTIFICATION- IRS EMPL- FED EMPL-

1979 1 STANLEY MALKIN
1987 2 STANLEY L. MALKIN & KAREN A. JOHNSO 136-46-8782
1989 3 STANLEY L. MALKIN 136-46-8782

LSTRET-1998 ME- CND-R FLC-07 199946
****
TAX PERIOD 30 197912* REASON CD- MOD EXT CYC-199946
****
FS-1 CRINV- LIEN-4 07254-632-00472-7 CAF-4 FZ>T -1W
TDA COPYS-4411 TDI COPYS-
INT TOLERANCE-MATH INCREASE-HISTORICAL DO-22 BWNC-
BWI
MF MOD BAL- 227,379.96
ACCRUED INTEREST- 0.00 12131999 CSED-09272003
ACCRUED PENALTY- 7,030.23 12131999 RSED-04151983
ARD1-0 ASED-11181991
150 05191980 829.86 198019
22221-111-04037-04037-0D CD-SRC
RCC - ERR- TAX PER T/P- 829.86
RET RCVD DT-04151980 F/C-1 AG1- 110,070.24

FOREIGN-FARM-MFP-
XRF-AEIC- 0.00
NAI-008011EXMPT-03 NRGY 0.00
LTEX- TAXABLE INC- 89,993.56
PENALTY SUPP- SET- 0.00
TOTAL WAGES 0.00
MDP- TOTAL INC TX - 0.00
EST TAX BASE- 829.86
PR YR BASE - 0.00
SHORT YR CD- ES FORGIVENESS % - 0

1St SE- 0.00 2nd SE- 0.00
ACCT TYPE-
EFT-0
F86515-0 UNAPPLD CR ELECT - 0.00
ES TAX PAYMENT 0.00
HIGH INCOME- DIR DEP REF RSN C-00
PUTI- 0.00 SUTI- 0.00
PMEI- 0.00 SMEI- 0.00
PMTI- 0.00 SMTI- 0.00

806 04151980 15,482.00- 198019 WTHLDNG TAX CREDIT
POSTED WITH RETURN
846 05191980 14,652.14 198019 22221-111-04037-0
RFND INT- 0.00
425 05211980----------198022 22277-137-20000-0
SOURCE-17 ORG- 1607 PROJ- RET REQ PTR DO-
420 08081980----------198034 22277-221-00000-0
AIMS# 1701502022
922 12091981 0.00 198129 19277-149-65210-1
PROCESS CD-01-35
560 03161983----------198312 22277-075-77500-3
ASED-04151984 CYCLES-
421 10081984----------198442 22277-221-00000-0
DISP CD-91 SOURCE-
300 09121988 0.00 198835 19247-636-10089-8
HC2 DCO7 87OD ASED
CLAIM REJECT DT-
420 10131988----------198845 22277-287-00000-8
AIMS# 3901991022
340 07221991 124,509.07 199128 19247-578-70062-1
TAX MOTIVATED AMT- 40,280.00

TAX MOTIVATED INT- 124,509.07
INTEREST TO DT- MSR-
COMPUTE INT AMT- 0.00
300 07221991 40,280.00 199128 19247-578-70062-1
HC DCO3 870D06041991 ASED 11181991
PC A0172
CLAIM REJECT DT-
421 07221991----------1991281 9247-578-70062-1
DISP CD- SOURCE
340 09161991 2,883.85 199136 08254-638-18037-1
TAX MOTIVATED AMT- 0.00
TAX MOTIVATED INT- 0.00
INTEREST TO DT - MSR-
COMPUTE INT AMT- 0.00
290 09161991 0.00 199136 08254-638-18037-1
HC3 ARC-68 INTD PC
CORRESPONDDT- CREDIT DT-
REFUND STATUTE CONTROL DT-
AMD CLMS DT-
470 08221991----------199136 19277-638-00309-1
COLCLOS- CYCLES-
340 02171992 7,850.47 199206 08254-427-18044-2
TAX MOTIVATED AMT- 0.00
TAX MOTIVATED INT- 0.00
INTEREST TO DT -01271992 MSR-
COMPUTE INT AMT- 0.00
290 02171992 0.00 199206 08254-427-18044-2
HC3 ARC-68 INTED PC
CORRESPONDDT- CREDIT DT-
REFUND STATUTE CONTROL DT-
AMD CLMS DT-
340 03301992 1,114.36 199212 08254-469-18052-2
TAX MOTIVATED AMT- 0.00
TAX MOTIVATED INT- 0.00
INTEREST TO DT -03021992 MSR-
COMPUTE INT AMT- 0.00
290 03301992 0.00 199212 08254-469-18052-2
HC3 ARC-68 INTD PC
CORRESPONDDT- CREDIT DT-
REFUND STATUTE CONTROL DT-
AMD CLMS DT-
340 04271992 1,798.42 199216 08254-497-18064-2

TAX MOTIVATED AMT- 0.00
TAX MOTIVATED INT- 0.00
INTEREST TO DT -04061992 MSR-
COMPUTE INT AMT- 0.00
290 04271992 0.00 199216 08254-497-18064-2
HC3 ARC-68 INTD PC
CORRESPONDDT- CREDIT DT-
REFUND STATUTE CONTROL DT-
AMD CLMS DT-
340 07271992 4,507.59 199229 08254-588-18052-2
TAX MOTIVATED AMT- 0.00
TAX MOTIVATED INT- 0.00
INTEREST TO DT -07061992 MSR-
COMPUTE INT AMT- 0.00
290 07271992 0.00 199229 08254-588-18052-2
HC3 ARC-68 INTD PC
CORRESPONDDT- CREDIT DT-
REFUND STATUTE CONTROL DT-
AMD CLMS DT-
582 10091992----------199224 06277-694-01957-2
REGULAR LIEN
670 10151992 0.00 199224 06218-689-00939-2
PRC -
DESG PAY CD-99
360 11091992 20.00 199244 06218-689-00939-2
PRC-
670 11301992 20,240.82 199250 06218-736-00488-2
PRC-
DESG PAY CE-07
340 06211993 14,547.10 199323 19254-548-18413-3
TAX MOTIVATED AMT- 0.00
TAX MOTIVATED INT- 14, 547.10
INTEREST TO DT -06121993 MSR-
COMPUTE INT AMT- 0.00
290 06211993 0.00 199323 19254-548-18413-3
HC3 ARC-68 INTD PC
CORRESPONDDT- CREDIT DT-
REFUND STATUTE CONTROL DT-
AMD CLMS DT-
290 062811993 0.00 199324 28254-552-15011-3
HC ARC-99 INTD PC1
CORRESPONDDT- CREDIT DT-

REFUND STATUTE CONTROL DT-
AMD CLMS DT-
706 11051993 121.67- 199424 19254-548-18413-3
XREF - 30 199212
INTEREST TO DATE-
582 10311994----------199445 65277-705-03608-4
REGULAR LIEN
670 11011994 0.00 199445 07218-705-01148-4
PRC-
DESG PAY CD-99
360 11211994 12.00 199445 07218-705-01148-4
PRC-
960 11141994----------199447 07277-719-00109-4
MF CAR CODE-1
290 02061995 0.00 199505 08254-763-15044-4
HC ARC-99 INTED PC1
CORRESPONDDT- 10011994 CREDIT DT-
REFUND STATUTE CONTROL DT-
AMD CLMS DT-
706 02091995 2.32- 199508 19254-548-18413-3
XREF- 30 199412
INTEREST TO DATE-
706 04151995 86.00- 199535 19254-548-18413-3
XREF- 30 199412
480 12151995----------199604 07227-762-01388-5
JURISDICTION-
480 12151995 199604-65277-762-55104-5
JURISDICTION-
480 05031996----------199621 65277-535-07490-6
JURISDICTION-
706 04151996 8,964.00- 199637 19254-548-18413-3
XREF- 30 199512
INTEREST TO DATE-
482 02191997----------199710 65277-456-06840-7
COLCLOS- CYCLES
670 02101997 11,075.18- 199710 07217-050-35000-7
PRC-
DESG PAY CD-
962 03031997----------199711 07277-463-01875-7
MF CAF CODE-4
340 03311997 71,662.09 199712 07254-466-18014-7
TAX MOTIVATED AMT- 0.00

TAX MOTIVATED INT- 71,662.09
INTEREST TO DT -03101997 MSR-
COMPUTE INT AMT- 0.00
290 03311997 0.00 199712 07254-466-18014-7
HC3 ARC-74 INTD PC
CORRESPONDDT- CREDIT DT-
REFUND STATUTE CONTROL DT-
AMD CLMS DT-
470 04211997----------199718 07277-513-01471-7
COLCLOS - CYCLES
480 05031996----------199720 07277-527-00960-7
JURIDICTION-
481 12131996----------199721 07277-527-00964-7
COLCLOS - CYCLES
472 06131997----------199726 07277-568-01526-7
COLCLOS - CYCLES
706 04151997 1,315.00- 199734 07254-466-18014-7
XREF- 30 199612
INTEREST TO DATE-
290 09081997 0.00 199735 07254-632-00472-7X
HC3 ARC-74 INTD PC
CORRESPONDDT- 03181997 CREDIT DT-
REFUND STATUTE CONTROL DT-
AMD CLMS DT-
520 02021998----------199806 13277-435-00647-8
COLCLOS - 73 PROC CLAIM-PYMT-AO
CSED EXTENSION- BLLC-13
MF STAT-12 05191980 14,652.14-
198019
MF STAT-21 07221991 164,789.07
199128
MF STAT-20 08261991 164,789.07
199133
MF STAT-48 09301991 0.00
199138
MF STAT-21 09161991 167,672.92
199136
MF STAT-20 01271992 167,672.92
199203
MF STAT-21 02171992 175,523.39
199206

MF STAT-54 03021992 199208	175,523.39
MF STAT-21 03301992 199212	176,637,75
MF STAT-56 04061992 199213	176,637.75
MF STAT-48 05041992 199217	0.00
MF STAT-21 04271992 199216	178,436.17
MF STAT-58 07061992 199226	178,436.17
MF STAT-21 07271992 199229	182,943.76
MF STAT-26 08171992 199232	182,943.76
MF STAT-22 05311993 199320	162,722.94
MF STAT-26 07191993 199327	177,270.04
MF STAT-26 0531994 199419	177,270.04
MF STAT-22 06311994 199422	177,270.04
MF STAT-26 07111994 199426	177,270.04
MF STAT-58 03109997 199709	157,032.87
MF STAT-48 03241997 199711	0.00
MF STAT-21 03311997 199712	228,694.96
MF STAT-22 04211997 199715	227,379,96
MF STAT-26 10271997 199742	227,379.96
MF STAT-22 02161998 199805	227,379.96